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No. 92-1848

IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

Supreme Court, U.S.
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CENTRAL STATES, SOUTHEAST AND SOUTHWEST AREAS PENSION FUND; BOARD OF TRUSTEES, CENTRAL STATES, SOUTHEAST AND SOUTHWEST AREAS PENSION FUND; EXECUTIVE DIRECTOR, CENTRAL STATES, SOUTHEAST AND SOUTHWEST AREAS PENSION FUND,

Cross-Petitioners,

v.

WHITWORTH BROTHERS STORAGE COMPANY,

Cross-Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

CROSS-PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

The question presented for review is whether the written documents governing an employee benefit plan subject to the Employee Retirement Income Security Act of 1974 (ERISA), as amended, 29 U.S.C. § 1001 *et seq.*, must withstand judicial review under a "reasonableness" standard? Specifically, whether a trust agreement provision limiting the period for which an employer may recover contributions paid to the plan by mistake may be determined to be "arbitrary and capricious" and set aside in favor of an equitable rule created by the court?

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
TABLE OF AUTHORITIES	iv
OPINIONS BELOW	1
JURISDICTION	2
STATUTORY PROVISIONS INVOLVED	2
STATEMENT OF THE CASE	2
1. The Parties	2
2. Background Facts and Proceedings below	3
SUMMARY OF REASONS FOR GRANTING THE WRIT	9
REASONS FOR GRANTING THE WRIT	11
I. THE COURTS OF APPEAL ARE SPLIT ON WHETHER FEDERAL COURTS MAY INVALIDATE PROVISIONS IN DOCUMENTS GOVERNING ERISA BENEFIT PLANS ON THE GROUND THAT THEY FAIL TO MEET A "REASONABLENESS" STANDARD	11
II. THE DECISION OF THE COURT BELOW THREATENS THE FINANCIAL STABILITY OF CENTRAL STATES AND OTHER EMPLOYEE BENEFIT PLANS WHICH CONGRESS HAS SOUGHT TO PROTECT. THE CONSEQUENCES OF THE ERROR ARE FAR-REACHING, AND RAISE QUESTIONS OF NATIONAL IMPORTANCE	19
CONCLUSION	24

TABLE OF AUTHORITIES

CASES Page

Adams v. Avondale Industries, Inc., 905 F.2d 943 (6th Cir.), *cert. denied*, 498 U.S. 984, 111 S.Ct. 517, 112 L.Ed.2d 529 (1990) 16, 23
Admiral Packing Co. v. Robert F. Kennedy Farm Workers Medical Plan, 874 F.2d 683 (9th Cir. 1989) 9, 13
Central States, Southeast and Southwest Areas Pension Fund v. Burton Slotky, 956 F.2d 1369 (7th Cir. 1992) 21
Central States, Southeast and Southwest Areas Pension Fund v. Central Transport, Inc., 472 U.S. 559, 105 S.Ct. 2833, 86 L.Ed.2d 447 (1985) 21
Crews v. Central States, 788 F.2d 332 (6th Cir. 1986) 8
Deak v. Masters, Mates and Pilots Pension Plan, 821 F.2d 572, (11th Cir. 1987) *cert. denied*, 484 U.S. 1005, 108 S.Ct. 698, 98 L.Ed.2d 650 (1988) 17
Dime Coal Co., Inc. v. Combs, 796 F.2d 394 (11th Cir. 1986) 8, 12
Hozier v. Midwest Fasteners, Inc., 908 F.2d 1155 (3d Cir. 1990) 14, 15
Jamail, Inc. v. Carpenters District Council of Houston Pension and Welfare Trusts, 954 F.2d 299 (5th Cir. 1992), *reh'g denied* 9, 13
Kwatcher v. Mass. Service Emp. Pension Fund, 879 F.2d 957 (1st Cir. 1989) 13
McGann v. H & H Music Co., 946 F.2d 401 (5th Cir. 1991), *cert. denied, sub nom.*, —— U.S. ——, 113 S.Ct. 482, 121 L.Ed.2d 387 (1988) 17
Moore v. Reynolds Metals, 740 F.2d 454 (6th Cir. 1984), *cert. denied*, 469 U.S. 1109, 105 S.Ct. 786, 83 L.Ed.2d 780 (1985) 10, 17, 18
Nachman Corp. v. PBGC, 446 U.S. 359, 100 S.Ct. 1728, 1738, 64 L.Ed.2d 354 (1980) 23
Phillips v. Amoco Oil Co., 799 F.2d 1464, (11th Cir. 1986), *cert. denied*, 481 U.S. 1016, 107 S.Ct. 1893, 95 L.Ed.2d 500 (1987) 16

TABLE OF AUTHORITIES—Continued

	Page
Plucinski v. IAM National Pension Fund, 875 F.2d 1052 (3d Cir. 1989)	9
Plumbers & Steamfitters Local 150 v. Vertex Construction, 932 F.2d 1443 (11th Cir. 1991)	10
Southern Pacific Co. v. Jensen, 244 U.S. 205, 37 S.Ct. 524, 61 L.Ed. 1086 (1917)	21
United Mine Workers v. Robinson, 455 U.S. 562, 102 S.Ct. 1226, 71 L.Ed.2d 419 (1982)	12
Van Orman v. American Ins. Co., 680 F.2d 301 (3d Cir. 1982)	9
Vasseur v. Halliburton Co., 950 F.2d 1002 (5th Cir. 1992)	17
Whitworth Brothers Storage Co. v. Central States, Southeast and Southwest Areas Pension Fund, 794 F.2d 221 (6th Cir.), *cert. denied*, 479 U.S. 1007, 107 S.Ct. 645, 93 L.Ed.2d 701 (1986)	7, 8, 13
Wise v. El Paso Natural Gas Co., 986 F.2d 929 (5th Cir. 1993), *reh'g denied*	17
STATUTES	
28 U.S.C. § 1254(1)	2
28 U.S.C. § 1291	2
28 U.S.C. § 1331	2, 6, 7
28 U.S.C. § 2201	6
29 U.S.C. § 141 *et seq.*	2
29 U.S.C. § 186	2
29 U.S.C. § 186(c)(5)	12
29 U.S.C. § 1001 *et seq.*	2
29 U.S.C. § 1001(a)	20
29 U.S.C. § 1002(2)(A)	2
29 U.S.C. § 1002(16)	14
29 U.S.C. § 1002(21)	15
29 U.S.C. § 1002(37)(A)	3
29 U.S.C. § 1052	23
29 U.S.C. § 1053	23
29 U.S.C. § 1103	2, 7
29 U.S.C. § 1103(c)(1)	22
29 U.S.C. § 1103(c)(2)(A)	4, 7
29 U.S.C. § 1103(c)(2)(A)(ii)	6

TABLE OF AUTHORITIES—Continued

	Page
29 U.S.C. § 1104	2
29 U.S.C. § 1104(a)(1)	21
29 U.S.C. § 1104(a)(1)(A)	3
29 U.S.C. § 1104(a)(1)(D)	14
29 U.S.C. § 1132	7
29 U.S.C. § 1132(a)(1)(B)	15
OTHER AUTHORITIES	
H.R. Conf. Rep. No. 1280, 93d Cong., 2d Sess., *reprinted in* 1974 U.S. Code Cong. & Admin. New 5038, 5083	24

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CROSS-PETITION FOR A WRIT OF CERTIORARI

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Sixth Circuit is reported at 982 F.2d 1006 and is reproduced in Petitioner's (Cross-Respondent's) Appendix to Petition for a Writ of Certiorari at pp. 2a-65a.[1] The unpublished district court opinion is reproduced in Pet. App. at pp. 70a-81a.[2]

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[1] Citations to Petitioners' Appendix will hereinafter be made as "Pet. App. at p. —".

[2] This case has a long history before the district court and the Sixth Circuit. The first district court opinion (which is unpub-

JURISDICTION

The district court's jurisdiction was invoked under 28 U.S.C. § 1331. The jurisdiction of the court of appeals was invoked under 28 U.S.C. § 1291. The judgment of the court of appeals affirming in part, reversing in part, and remanding to the district court was entered on January 11, 1993, and its order denying rehearing was entered on February 16, 1993. Cross-Petitioners were served with the original petition for writ of certiorari on May 19, 1993. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

The statutes involved in this case are part of, respectively, the Employee Retirement Income Security Act of 1974 ("ERISA"), as amended, 29 U.S.C. § 1001 *et seq.* and the Labor-Management Relations Act ("LMRA"), 29 U.S.C. § 141 *et seq.*; specifically:

29 U.S.C. § 1103 (section 403 of ERISA)
29 U.S.C. § 1104 (section 404 of ERISA)
29 U.S.C. § 186 (section 302 of the LMRA)

Relevant parts of these statutes are reproduced in Appendix A, *infra*, at pp. 1a-3a.

STATEMENT OF THE CASE

1. *The Parties.*

Central States, Southeast and Southwest Areas Pension Fund ("Central States" or "Pension Fund")[3] is a multiemployer pension benefit plan as defined in Section 3(2)(A) of the Employee Retirement Income Security Act of 1974 ("ERISA") (as amended), 29 U.S.C. § 1002(2)(A). A multiemployer plan is one to which

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lished) was issued on January 15, 1985. The opinion of the United States Court of Appeals for the Sixth Circuit reversing the first district court opinion is reported at 794 F.2d 221.

[3] As Central States is a multiemployer benefit plan there are no parent or subsidiary corporations.

[4] Citations to ERISA will hereinafter be made to its codification at 29 U.S.C. § 1001 *et seq.*

more than one employer is required to make contributions pursuant to collective bargaining agreements with one or more local unions. 29 U.S.C. § 1002(37)(A). All contributions and earnings thereon are used to provide pension benefits for participants and beneficiaries and to defray reasonable administrative expenses. 29 U.S.C. § 1104(a)(1)(A). Central States was established pursuant to a trust agreement that provides that Central States shall be administered by a Board of Trustees. The Board of Trustees consists of four trustees appointed by labor organizations of the International Brotherhood of Teamsters Chauffeurs, Warehousemen and Helpers of America ("IBT") and four trustees appointed by em-employer associations in accordance with the Taft-Hartley Act. The trust agreement grants the Trustees the power to create a pension plan document and to amend the pension plan document and the trust agreement. Trust Agreement, Article VII, Secs. 1, 3; Article X, reproduced in Appendix B, *infra*, at pp. 4a-6a.

Whitworth Brothers Storage Company ("Whitworth Brothers") was an employer which participated in the Pension Fund and made contributions to the Pension Fund pursuant to the terms of collective bargaining agreements between itself and a local union affiliated with the IBT.

2. *Background Facts and Proceedings below.*

Many of the facts pertinent to this cross-petition are accurately stated in the opinion of the Sixth Circuit. Pet. App. at pp. 2a-65a. Facts appearing in the record below, but not in the Sixth Circuit's opinion, are parenthetically cited as "(R. ——)".

A. Whitworth Brothers' Refund Claim, and the Pension Trust Agreement Provision Related to Refunds.

This case concerns the effect of a provision in the Pension Fund's trust agreement which requires employers who make refund claims for mistaken contribution pay-

ments to do so within one year of the time from which the mistaken payment was made.

Whitworth Brothers began participating in the Central States Pension Fund in June 1964. (R. 36: Priede Affidavit, ¶ 6). It submitted contributions on behalf of William Whitworth from June 1964 through March 1980, and on behalf of Ernest Whitworth from June 1964 through June 1981. (R. 36: Priede Affidavit, ¶ 6.) It also submitted contributions on behalf of other individuals. On November 10, 1980, Whitworth Brothers made a demand to Central States for a refund of certain contributions mistakenly made on behalf of William Whitworth over a period of 15 years. At the time this demand was made, the provision of the Central States Pension Fund Trust Agreement which governed employer refunds, Article XIV, Section 1, provided:

> In no event shall the Employers, directly or indirectly, receive any refund on contributions made by them to the Trust, except in case of bona fide mistake, and as to which contributions are returned within *one year* after payment of the contributions . . .

Appendix B, *infra* at pp. 6a-7a (emphasis added). (*See also* R. 36: Priede Affidavit, Exhibit A.)

This Trust Agreement provision was based on ERISA's refund rule, 29 U.S.C. § 1103(c)(2)(A), which, prior to September 26, 1980, permitted a pension plan to return only contributions made by an employer under a mistake of fact within one year after payment of the contributions:

> In the case of a contribution, which is made by an employer by a mistake of fact, paragraph (1) shall not prohibit the return of such contribution to the employer within one year after the payment of the contribution.

Paragraph (1) provided that "the assets of a plan shall never inure to the benefit of any employer." Congress

amended this provision on September 26, 1980 to read, in pertinent part, as follows:

> (2)(A) In the case of a contribution . . .
>
> (ii) . . . made by an employer to a multiemployer plan by a mistake of fact or law . . ., paragraph (1) shall not prohibit the return of such contribution or payment to the employer within six months after the plan administrator determines that the contribution was made by such a mistake.

In December 1980, the Central States Trustees amended the refund rule found in Article XIV, Section 1 of the Trust Agreement, retroactive to September 26, 1980, to liberalize somewhat the refund provision in the wake of the ERISA amendment which made such liberalization possible. The amended trust agreement, in relevant part, provides:

> In no event shall the Employers, directly or indirectly, receive any refund on contributions made by them to the Trust, except a refund of contributions made by a mistake of fact or law (other than a mistake about plan qualification or tax-exempt status pursuant to the Internal Revenue Code) as determined by the Trustees if application therefor is received within one year after payment of the contributions.

(R. 36: Priede Affidavit, Exhibit B.)

In adopting this change the Trustees recognized:

> (a) the need to deter, and to protect the Fund from, employer payment of contributions on behalf of employees or other persons *ineligible* to become participants and beneficiaries of the Fund, by application of reasonable standards for entitlement to employer contribution refunds; and (b) the need to deter, and to protect the Fund from, unjustified and detrimental delay by employers in seeking employer contribution refunds, by application of *reasonable time limits* upon request for such refunds . . ."

(R. 36: Priede Affidavit, Exhibit B [emphasis in original].)

B. The Proceedings Below.

On November 10, 1980, Whitworth Brothers made its demand for a refund. The request for a refund of pension contributions made on William Whitworth's behalf from June 1964 through November 10, 1979 was denied, but a refund credit was approved in accordance with Article XIV, Section 1 of the Trust Agreement for the period of November 11, 1979 (one year prior to the request) through March 1, 1980 (the last day of contributions made on William Whitworth's behalf). Prior to filing a lawsuit, Whitworth Brothers did not seek a refund of any contributions made on behalf of Ernest Whitworth.

In September 1983, Whitworth Brothers sued Central States, in a three-count complaint seeking a refund of contributions made to the Central States Pension Fund on behalf of William and Ernest Whitworth. Specifically, Count I of the complaint alleged a right, pursuant to 29 U.S.C. § 1103(c)(2)(A)(ii), to recover contributions made by Whitworth Brothers to the Pension Fund on behalf of William Whitworth and Ernest Whitworth *after* the effective date of ERISA (i.e., after January 1, 1975); Count II alleged a pendent state-law claim for restitution of Whitworth Brothers' contributions for William Whitworth and Ernest Whitworth *prior* to the effective date of ERISA (i.e., prior to January 1, 1975); and Count III sought a declaratory judgment pursuant to 28 U.S.C. § 2201 that Ernest Whitworth is not covered by the collective bargaining agreement providing for contributions to the Pension Fund, that Whitworth Brothers is entitled to restitution plus interest of the payments made on Ernest Whitworth's behalf, and that Central States is not entitled to recover unpaid contributions. Jurisdiction was claimed pursuant to ERISA and 28 U.S.C. § 1331.

In January 1985, the district court entered an order dismissing the ERISA counts of the Complaint for lack of jurisdiction over the subject matter because ERISA did not specifically authorize employers to file ERISA

actions, and dismissing the pendent state law claim pursuant to its discretionary authority.

Whitworth Brothers appealed, and the United States Court of Appeals for the Sixth Circuit reversed and remanded. *Whitworth Brothers Storage Co. v. Central States, Southeast and Southwest Areas Pension Fund*, 794 F.2d 221 (6th Cir.), *cert. denied*, 479 U.S. 1007, 107 S.Ct. 645, 93 L.Ed2d 701 (1986) ("*Whitworth I*"). In its opinion, the Sixth Circuit considered "whether the district court had jurisdiction of such a claim [by an employer for restitution of contributions made, allegedly by mistake, to an employee benefit plan] based on: (1) the express actions recognized in ERISA; (2) an action implied from the terms of the statute; or (3) an action arising under federal common law." 794 F.2d at 224. The Sixth Circuit answered the first two of these questions in the negative, holding that "section 502 [29 U.S.C. § 1132] is an exclusive grant of jurisdiction, that ERISA does not expressly provide for an action by an employer against a fund for a refund of contributions," and that an employer has no "implied right of action pursuant to section 403 [29 U.S.C. § 1103]." *Id.* at 228, 233. However, the Sixth Circuit characterized Whitworth Brothers' restitution claim as a "contract claim", found that such a claim is governed by federal common law and held that Whitworth Brothers' action for restitution "arises under" federal law for the jurisdictional purposes of 28 U.S.C. § 1331. *Id.* at 236. The Sixth Circuit held the district court erred in concluding that it had no jurisdiction over the case. *Id.* at 236. In so holding, however, the Sixth Circuit made it clear that Whitworth Brothers' federal common law claim was expressly limited by the terms of ERISA set out in 29 U.S.C. § 1103(c)(2)(A), and by the terms of the agreement between the parties. *Id.* at 236, n.24. (The Sixth Circuit, as do a number of the other courts of appeals, refers to the written documents governing the plan [the plan document and, where applicable, the collective bargaining agreement and trust

agreement or declaration of trust] as "agreements," "contracts," or "contractual documents." *See Whitworth I*, 794 F.2d at 236 n. 24 ("agreement"); *Crews v. Central States*, 788 F.2d 332, 336 (6th Cir. 1986) ("the contract in this case, the Trust Agreement. . .")).

Central States petitioned this court for a writ of certiorari to resolve the direct conflict between the Sixth Circuit in *Whitworth I* and the Eleventh Circuit in *Dime Coal Company, Inc. v. Combs*, 796 F.2d 394 (11th Cir. 1986), which held that a federal common law cause of action of restitution was not available to employers which made mistaken contributions to employer benefit plans. This Court denied certiorari.

On remand, Central States moved for Summary Judgment. The district court granted Central States' motion as to counts one and two of the complaint, holding that: (1) since the Board of Trustees of Central States acted in accordance with the written trust agreement, the Trustees' decision as to Whitworth Brothers' claim for a refund was not arbitrary or capricious (Count I); and (2) Whitworth Brothers' claim for restitution of contributions paid to Central States prior to January 1, 1975 (when ERISA became effective) was barred by the contract of the parties (the trust agreement) which limited claims for refunds, as described above. (Count II). Because of the district court's ruling on counts one and two, there remained no issue of fact on count three; therefore, judgment on count three was for Whitworth Brothers. Whitworth Brothers appealed again.

The Sixth Circuit issued an opinion on January 11, 1993, in which it affirmed in part and reversed in part the judgment of the district court, and remanded for further proceedings; specifically: (1) the district court's denial of a refund for all pre-ERISA contributions made prior to January 1, 1975, was affirmed on the basis of the trust agreement provision in effect during that period; (2) the dismissal of the complaint in regard to post-

ERISA contributions made on behalf of Ernest Whitworth after January 1, 1975, was affirmed because he had not requested a refund from the Pension Plan before filing suit; (3) the grant of summary judgment in regard to the denial of a refund of post-ERISA contributions made on behalf of William Whitworth after January 1, 1975, was reversed and remanded for a hearing on the validity of the trust agreement provision in effect after the 1980 amendment; and (4) the district court's decision that no interest is due on whatever amounts are refunded (pursuant to subparagraph 3 above) was affirmed. Pet. App. at pp. 63a-65a. Whitworth Brothers' petition for Rehearing was denied on February 16, 1993. Pet. App. at pp. 68a-69a.

SUMMARY OF REASONS FOR GRANTING THE WRIT

In this case the United States Court of Appeals for the Sixth Circuit has held that the terms of a pension plan trust agreement regulating refunds to employers must withstand scrutiny for reasonableness under "equitable principles." The Fifth Circuit appears to have taken a similar approach in *Jamail, Inc. v. Carpenters Dist. Council of Houston Pension and Health and Welfare Fund*, 954 F.2d 299, 305 (5th Cir. 1992), *reh'g denied*. In contrast, the Ninth Circuit and the Third Circuit maintain that the courts cannot set aside provisions in a benefit plan or trust agreement affecting refund claims when those terms are fixed by a trust agreement and a collective bargaining agreement (*Admiral Packing Co. v. Robert F. Kennedy Farm Workers Medical Plan*, 874 F.2d 683, 684 (9th Cir. 1989)), or by other documents governing the plan (*Van Orman v. American Ins. Co.*, 680 F.2d 301, 312 (3rd Cir. 1982) (requesting a refund of contributions which, although not mistakenly made, resulted in a surplus)). *But see Plucinski v. IAM National Pension Fund*, 875 F.2d 1052 (3d Cir. 1989) (*contra*).

These contradictory approaches result from an even deeper conflict and confusion among the courts of appeals

as to the role of the judiciary in reviewing the substantive terms of the documents governing employee benefit plans. Indeed, within a given circuit it is possible to find statements from different panels which support both sides of this issue. *Compare Moore v. Reynolds Metals Co. Retirement Program for Salaried Employees*, 740 F.2d 454, 456 (6th Cir. 1984), *cert. denied*, 469 U.S. 1109, 105 S.Ct. 786, 83 L.Ed.2d 780 (1985) ("[a]bsent a violation of federal or state law, a federal court may not modify a substantive provision of a pension plan"), *with* the Sixth Circuit's ruling in this case. *See* Pet. App. at pp. 50a-51a. ("[W]e believe . . . the district court erred in upholding the one-year limitation rule found in the trust agreement without considering the equities involved.")

The line of decisions holding that the courts should effectively re-write the terms of the documents governing employee benefit plans is contrary to ERISA. Under ERISA, neither Congress nor the courts are involved in either the decision to establish a plan or the substantive terms of the plan. For example, in this case the court of appeals simply had no authority to require the Pension Fund to prove that the challenged refund provision was "fair" to the contributing employer, "necessary" for the operation of the plan, and generally "reasonable." The employer had *agreed* in a collective bargaining agreement to contribute to the Pension Fund, and therefore the employer was bound by the terms of the Pension Fund's written trust agreement (*Plumbers & Steamfitters Local 150 v. Vertex Construction*, 932 F.2d 1443, 1451 (11th Cir. 1991))—however "unfair" a court may later decide those terms to be.

Further, rulings like that of the court of appeals in this case undermine the stability and certainty in the employee benefit area which Congress acted to foster under ERISA. Congress sought to promote the written documents governing the plan as the final and certain arbiter in matters relating to employee benefits and plan governance; where these written documents are unambiguous

and do not conflict with the express terms of ERISA, they are controlling. In this case, however, the court of appeals has claimed authority to overrule the unambiguous terms of the documents governing an employee benefit plan. This marks a trend towards a type of judicial activism which threatens the stability of employee benefit plans, and, ultimately, the certainty of the promised benefits. Under the ruling announced by the court of appeals in this case, contributing employers, employees, retirees and anyone else affected by a benefit plan will have standing to challenge any written terms of any governing plan document which they perceive to be "unreasonable". This would burden the benefit plans with staggering litigation costs, and actually impede their ability to pay benefits in accordance with express plan terms.

This Court should act to correct the conflict among the circuits on this important question. The Court should prevent the erosion of ERISA's insistence that plans be operated pursuant to written documents under the guise of principles of "fairness," "equity," and "reasonableness," as discerned by judges who have not sufficiently grounded their views in the actual language and purposes of the statute.

REASONS FOR GRANTING THE WRIT

I. THE COURTS OF APPEAL ARE SPLIT ON WHETHER FEDERAL COURTS MAY INVALIDATE PROVISIONS IN DOCUMENTS GOVERNING ERISA BENEFIT PLANS ON THE GROUND THAT THEY FAIL TO MEET A "REASONABLENESS" STANDARD.

The split among the Circuits which Cross-Petitioners ask the Court to address was articulated by the Sixth Circuit in this case as follows:

> "The Circuit Courts are split in regard to the issue of whether a federal court may determine in an action for restitution under federal common law that

> a contractual limitation on refunds for contributions mistakenly made is unreasonable."

Pet. App. at pp. 34a-35a.

Underlying this split is a division among the circuits on the question of whether a federal common law cause of action for restitution exists at all. Paralleling this split is a broader disagreement among the Circuits about whether federal courts are empowered generally to engage in substantive review of the provisions in documents governing employee benefit plans, a disagreement which reflects conflicting interpretations of this Court's decision in *United Mine Workers v. Robinson,* 455 U.S. 562, 102 S.Ct. 1226, 71 L.Ed.2d 419 (1982), which held:

> "There is no general requirement that the complex schedule of the various employee benefits must withstand judicial review under an undefined standard of reasonableness."

Robinson, 455 U.S. at 574, 102 S. Ct. at 1233 (construing § 302(c)(5) of the Labor-Management Relations Act, 29 U.S.C. § 186(c)(5)).

The authoritative voice of this Court is needed to make it clear that the provisions in the written documents governing ERISA benefit plans are not subject to judicial review under an undefined standard of "reasonableness."

The confusion among the courts of appeals is reflected in the vast difference in the law from one Circuit to another. The Eleventh Circuit has held that no federal common law cause of action exists for recovery of mistaken contributions at all. *Dime Coal Co. Inc. v. Combs,* 796 F.2d 394, 399 n.7 (11th Cir. 1986).

The other Circuits which have addressed the question have held that a cause of action exists, but are in disarray as to whether a "contractual" document (collective bargaining agreement, trust agreement, or plan document) will control the result and, if not, what weight should be

given to such written refund provisions. The Ninth Circuit has held that a trust declaration provision governing refunds controls the outcome and is not subject to judicial review for reasonableness, at least where the trust provision is based upon a collective bargaining agreement provision. *Admiral Packing Co. v. Robert F. Kennedy Farm Workers Medical Plan*, 874 F.2d 683 (9th Cir. 1989). In *Whitworth I*, the Sixth Circuit held that any recovery would be limited by terms of the relevant agreement, *Whitworth v. Central States*, 794 F.2d 221, 236 n.24 (6th Cir. 1986), but in *Whitworth II* it held that the refund provision in the trust agreement would be ignored unless it were "based on actuarial data and necessary to the fund's financial stability." Pet. App. at p. 52a. It also indicated that even a clear provision in a collective bargaining agreement would not control the outcome. *Id.* at 48a. The Fifth Circuit has held that a benefit plan's refund policy "could be one of the many factors considered in analyzing the equities of the case." *Jamail, Inc. v. Carpenters District Council of Houston Pension and Welfare Fund*, 954 F.2d 299 (5th Cir. 1992), *reh'g denied*. In *Jamail* the Fifth Circuit found other factors more important, however, and created a four year rule to replace the benefit plan's six month rule. It limited its holding to the "equities" of the case, however, indicating that the plan's six-month rule might be respected in other situations. Similarly, the First Circuit has declined to offer a "catalog" of the considerations subject to equitable weighing: "Equity, after all, is meant to be flexible." *Kwatcher v. Mass. Service Emp. Pension Fund*, 879 F.2d 957, 967 (1st Cir. 1989).

This issue is crucial to benefit plans and to the entire fabric of ERISA. The circuits holding that there must be review of the "reasonableness" of refund restrictions are opening the door to substantive judicial scrutiny of all the terms of ERISA plans. This will embroil the federal courts in issues that are far removed from the

fundamental ERISA concern for upholding the sanctity of employee benefits in accordance with written plan documents and written procedures. This sort of judicial intervention is in fact directly opposed to the goals of ERISA because it results in wiping out the terms of the written governing documents which federal courts find to be "unreasonable" under "principles of equity". Pet. App. at 34a-36a. Indeed, it appears to be the view of the Sixth Circuit in this case that it is the business of the courts to seek out and destroy "inequitable" terms even in a collective bargaining agreement. Pet. App. at 48a.

This Court should clarify that the reasoning of *Robinson* applies (and court review is inappropriate) to all of the "documents and instruments governing the plan," ERISA § 404(a)(1)(D), 29 U.S.C. § 1104(a)(1)(D), absent a specific violation of ERISA or other federal law. The structure of ERISA, as well as the intent of Congress in passing it, requires this result.

ERISA § 3(16), 29 U.S.C. § 1002(16), defines the two entities primarily involved in overseeing the plan:

> (A) The term "administrator" means:
>
> (i) the person specifically so designated . . .;
>
> (ii) if an administrator is not so designated, the plan sponsor;
>
> (B) The term "plan sponsor" means (i) the employer in the case of an employee benefit plan established or maintained by an employer, . . . or (iii) in the case of a plan established or maintained . . . jointly by one or more employers and one or more employee organizations, the . . . joint board of trustees . . . who establish or maintain the plan.

The plan sponsor is the entity which creates the benefit plan and amends it. *Id.; Cf. Hozier v. Midwest Fasteners, Inc.*, 908 F.2d 1155, 1158-1161 (3d Cir. 1990). The plan administrator, on the other hand, manages the plan

in accordance with the documents governing the plan (generally the plan document and, in the case of a plan operated through a trust fund, the trust agreement). The roles of these two entities are distinct, and ERISA treats them differently, providing for judicial review of certain plan administrator actions but not plan sponsor actions (unless the latter conflict with a specific provision of ERISA).

> "Under ERISA, the roles of plan administrator and plan sponsor are distinct. The plan administrator owes a fiduciary duty to plan participants; the plan sponsor, so long as it is not acting as an administrator, generally does not."

Hozier v. Midwest Fasteners, Inc., 908 F.2d at 1158.[5] Of course the plan sponsor may also act as plan administra-

---

[5] While ERISA creates no cause of action to review the actions of the plan sponsor creating or amending the documents governing a plan, the actions of a plan administrator who denies benefits may be reviewed:

> "A civil action may be brought . . . by a participant or beneficiary . . . to recover benefits due to him *under the terms of his plan*. . . ."

29 U.S.C. § 1132(a)(1)(B) (emphasis added). The origin of the distinction in treatment is the definition of "fiduciary" in ERISA:

> Except as otherwise provided in subparagraph (B), a person is a fiduciary with respect to a plan to the extent (i) he exercises any discretionary authority or discretionary control respecting management of such plan or exercises any authority or control respecting management or disposition of its assets, (ii) he renders investment advice for a fee or other compensation, direct or indirect, with respect to any moneys or other property of such plan, or has any authority or responsibility to do so, or (iii) he has any discretionary authority or discretionary responsibility in the administration of such plan. Such term includes any person designated under section 1105(c)(1)(B) of this title.
>
> 29 U.S.C. § 1002(21).

While a fiduciary has duties under ERISA, and remedies are provided for breaches of those duties, there are no provisions for plan sponsor duties or remedies to address plan sponsor action, unless the action violates a specific provision of ERISA.

tor, as is the case with Central States' Board of Trustees. In such cases, the question of whether an action is subject to judicial review depends on what type of function the board is performing.

But in determining whether "administration" includes decisions to create or amend a plan's provisions (or a trust agreement's provisions), courts have been mindful, at least in regard to amendments concerning benefits eligibility, of Congress' expressed intent not to permit judicial review of plan sponsor decisions with respect to plan amendment:

> In drawing the line between employer actions subject to the fiduciary duty requirement and those not, we must avoid any rule that would undermine Congress' considered decision that welfare benefit plans not be subject to a vesting requirement. . . . We employ a rule . . . that a company does not act in a fiduciary capacity when deciding to amend or terminate a welfare benefits plan.

Adams v. Avondale Industries, Inc., 905 F.2d 943, 947 (6th Cir.), *cert. denied*, 498 U.S. 984, 111 S.Ct. 517, 112 L.Ed.2d 529 (1990). This rule applies equally to non-vested benefits under a pension plan. *Phillips v. Amoco Oil Co.*, 799 F.2d 1464, 1471 (11th Cir. 1986), *cert. denied*, 481 U.S. 1016, 107 S.Ct. 1893, 95 L.Ed.2d 500 (1987) ("ERISA simply does not prohibit a company from eliminating previously offered [retirement] benefits that are neither vested nor accrued.").

In determining not to authorize judicial review of provisions governing the plan themselves, Congress struck a balance:

> Although Congress sought to establish minimum standards for pension plans to assure that employees would not be denied benefits arbitrarily, it recognized that if its standards were too stringent, the creation of new pension plans would be discouraged. . . . Thus, Congress struck a balance by providing for judicial review of trustees' administrative decisions

> while declining to dictate the type of benefits which must be included in voluntarily established retirement plans.

Moore v. Reynolds Metals Co. Retirement Program for Salaried Employees, 740 F.2d at 457 (*"Reynolds Metals"*).

The court in *Reynolds Metals* cited this Court's decision in *Robinson* for the proposition that "[a]bsent a violation of federal or state law, a federal court may not modify a substantive provision of a pension plan." *Id.* at 456. While *Robinson* was only concerned with § 302 of the LMRA, *Reynolds Metals* extended its reasoning to ERISA. *Id.* at 456. The Fifth Circuit in turn has relied on the same construction of ERISA and has extended it to a single employer trust fund. *Vasseur v. Halliburton Co.*, 950 F.2d 1002, 1004, 1006-1007 (5th Cir. 1992). *Cf. McGann v. H & H Music Co.*, 946 F.2d 401 (5th Cir.), *cert. denied sub nom.*, —— U.S. ——, 113 S.Ct. 482, 121 L.Ed.2d 387 (1991); and *Wise v. El Paso Natural Gas Co.*, 986 F.2d 929 (5th Cir. 1993), *reh'g denied*. It is no less a function of the plan sponsor to determine the circumstances under which plan assets may be expended in refunding a contribution. If ERISA does not prohibit Central States' trust agreement provision, then it must be allowed. No "arbitrary and capricious" standard may be applied.

An opposite view of *Robinson* is provided in *Deak v. Masters, Mates and Pilots Pension Plan*, 821 F.2d 572 (11th Cir. 1987), *cert. denied*, 484 U.S. 1005, 108 S.Ct. 698, 98 L.Ed.2d 650 (1988). In that case the Eleventh Circuit read *Robinson* as supporting an "arbitrary and capricious" review of plan amendments under ERISA. *Id.* at 574, 577. *Deak* held that a court should examine "whether a rational relationship exists between the Trustees' actions and the Plan's purpose," *id.* at 577, almost the exact proposition *rejected* by this Court in *Robinson*,

at least in the context of the LMRA. *See Robinson*, 455 U.S. at 568, 102 S.Ct. at 1230. This is also almost identical to the position taken by the Sixth Circuit in *Whitworth II* (i.e., "[U]nless a refund limitation policy is based on actuarial data and necessary to the pension fund's financial stability, it is not necessary for the protection of the property held under the trust agreement for the benefit of the employees, and is arbitrary and capricious.") Pet. App. at p. 52a.[6] This is the broader conflict discussed above between Circuits which hold that *Robinson*'s reasoning precludes judicial review of the provisions of benefit plans, and Circuits which hold that *Robinson*'s reasoning *requires* judicial review of benefit plan provisions for reasonableness.

Thus, there exists a conflict between *Whitworth II* and the principle this Court articulated in *Robinson* that no general requirement of reasonableness is imposed on benefit plan rules; and there exists a conflict between the Sixth Circuit in *Reynolds Metals* and the Ninth Circuit in *Admiral Packing*, on the one hand, and the Eleventh Circuit on the other hand, concerning the application of *Robinson*'s reasoning under ERISA. (There also exists a conflict within the Sixth Circuit between the principles in *Reynolds Metals* and those in *Whitworth II*. *See* fn. 6, *supra*).

This Court should grant the cross-petition for certiorari in order to clarify the reach of *Robinson*'s reasoning and to eliminate these conflicts by ruling that otherwise valid provisions in documents governing benefit plans are not

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[6] In addition to the fact that there is the apparent conflict just discussed between the Sixth, Ninth, and Eleventh Circuits in their application of this Court's decision in *Robinson*, there is a conflict within the Sixth Circuit between the principles set forth in its decision in *Reynolds Metals* and the principles under which *Whitworth II* was decided. *Reynolds Metals* states that no pension plan provisions are subject to judicial review, whereas *Whitworth II* indicates that all plan provisions are subject to judicial review.

reviewable by courts under ERISA, the LMRA, or federal common law for their adequacy under an "arbitrary and capricious" standard in order to satisfy a court's notion of reasonableness or equity.

II. THE DECISION OF THE COURT BELOW THREATENS THE FINANCIAL STABILITY OF CENTRAL STATES AND OTHER EMPLOYEE BENEFIT PLANS WHICH CONGRESS HAS SOUGHT TO PROTECT. THE CONSEQUENCES OF THE ERROR ARE FAR-REACHING, AND RAISE QUESTIONS OF NATIONAL IMPORTANCE.

The consequences of the court's error [7] are far-reaching; the implications are great because its impact goes beyond the parties to this lawsuit, and it invites the courts to second-guess provisions in the documents governing benefit plans.

At first blush this appears to be a small case. If the issue of whether Central States' one-year refund limitation provision in regard to post-ERISA contributions is not arbitrary or capricious is tried before the district court (it should not be), and *if* Whitworth Brothers prevails, its recovery will be limited to just $4,238.00 (i.e., the amount of post-ERISA contributions made to Central States on behalf of William Whitworth). But the amounts potentially at issue here are hardly trivial, and more importantly, the most damaging aspect of the court's decision

---

[7] The district court, unlike the court of appeals, correctly applied the *appropriate standard of review*: it held that the trustees' decision denying Whitworth Brothers' refund request was not arbitrary and capricious based on the evidence before the trustees at the time of their final decision, and the controlling trust agreement provision. Thus, the only issue before the court of appeals was whether the district court's decision was erroneous, i.e., whether the district court applied the wrong standard of review. The court of appeals' failure to address the issue, and its decision that the issue to be decided by the district court was whether Central States' one-year refund limitation in its trust agreement regarding post-ERISA contributions made after January 1, 1975 is not arbitrary or capricious is clearly wrong.

goes beyond its direct monetary impact. On remand, Whitworth Brothers filed a motion for leave to amend to add a class action to the lawsuit. The class, if certified, will be seeking (as Whitworth Brothers has indicated) to recover approximately $700,000.00 from the Pension Fund in contributions which had been received by the Pension Fund over a period of years prior to December 1983. These are amounts the Pension Fund has relied upon in making its actuarial projections and in paying retiree pension benefits for more than a decade.

In enacting ERISA, Congress determined that since "the continued well-being and security of millions of employees, retirees, and their dependents are directly affected with a national interest," 29 U.S.C. § 1001(a), the financial stability of employee benefit funds (such as Central States) is a public concern. If not corrected, the court's error will have an adverse effect on the financial stability of Central States (the nation's largest multiemployer benefit fund) and other employee benefit funds. The financial stability of such funds, which Congress has sought to protect, should not be threatened by the decision of the court below. The most significant threat to the Pension Fund's stability posed by the court's decision is not even the danger of increasing the amount of its currently unfunded vested benefits, but rather the prospect that every provision of its plan and trust agreement may be challenged as being "arbitrary."

The court of appeals is wrong to have second-guessed the trustees. The mischief created by the Sixth Circuit's ruling is particularly troublesome because—although the ruling is cloaked in the deferential language of the "arbitrary and capricious" standard—in reality the court has held that employee benefit plan trust agreement amendments limiting refunds must be justified by financial "necessity" and "compelling reasons". *Id.* This is, at best, cosmetic "deference" which in fact straight-jackets the Pension Fund Trustees and requires them to prove that

every penny in refund claims that are denied by a trust agreement provision is "necessary".

In addition, as noted, it appears that in the view of the Sixth Circuit, the courts should apply "equitable principles" to overturn the express written terms of employee benefit plans even though the employer has *agreed* to the terms in a collective bargaining agreement. Pet. App. at p. 48a. This portends a "federal common law" which is not guided by concrete policies articulated in federal statutes, but is instead a recrudescence of the "brooding omnipresence in the sky" first criticized by Justice Holmes in *Southern Pacific Co. v. Jensen*, 244 U.S. 205, 222, 37 S.Ct. 524, 531, 61 L.Ed. 1086 (1917) (Holmes, J., dissenting). An employer contributing to a multiemployer pension plan such as Central States is bound by the terms of the pension plan and trust agreement and is not free to seek release from these terms on "equitable" principles. *Cf., e.g., Central States, Southeast and Southwest Areas Pension Fund v. Central Transport, Inc.*, 472 U.S. 559, 563-64, 105 S.Ct. 2833, 2836-37, 86 L.Ed.2d 447 (1985). The court below ignored the employer's duty to adhere to the Trust Agreement, and imposed a judicially concocted and ill-defined duty of "fairness" upon the Pension Fund.

As noted above, in December 1980 the Trustees stated their reasons for adopting the refund provision with its time limitations. In light of the Pension Fund's obligation in December 1980 to pay vested pension benefits which exceeded the projected value of the Fund's assets (an obligation extant today)[8] were the trustees, as plan fiduciaries, required to expend fund assets on an actuarial study which would only provide them an answer which was immediately and painfully obvious? The Sixth Circuit seems to think so. In theory, the court of appeals would

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[8] *See e.g., Central States, Southeast and Southwest Areas Pension Fund v. Burton Slotky*, 956 F.2d 1369 (7th Cir. 1992).

require a plan to undertake a new actuarial study with each employer refund request. The costs of doing so are clearly prohibitive. When Congress enacted ERISA to protect employee benefit rights it certainly did not envision that plans should be self-destructing; nor did it envision courts writing rules which would undermine a plan's financial stability.

This concern is evident through Congress' mandate that "the assets of a plan shall never inure to the benefit of any employer and shall be held for the exclusive purposes of providing benefits to participants in the plan and their beneficiaries and defraying reasonable expenses of administering the plan." 29 U.S.C. § 1103(c)(1).

The Sixth Circuit's error threatens the financial stability of Central States and other benefit funds because it inappropriately second-guesses the decision making of plan sponsors and threatens to override refund provisions which, like that of Central States, contain time limitations on the availability of refunds. If courts are permitted to review refund limitations under a general rule that the documents governing employee benefit plans may be reviewed for reasonableness, then the floodgates are open for employers, participants, beneficiaries, and their dependents to challenge any plan provision which they deem to be contrary to their individual personal or pecuniary interests.

This will result in the courts dictating the substantive terms of employee benefit plans. Congress itself was reluctant to enter this arena. Thus, for the most part ERISA avoids dictating the substantive content of employee benefit plans, and only provides procedural rules for plan governance. The purpose of ERISA is "to make sure that if an employee has been promised a defined pension benefit . . . , he will actually receive it"—not to establish by governmental fiat what the promised pension benefit must be, or to mandate any other terms of the

employee benefit plan. *Nachman Corp. v. PBGC,* 446 U.S. 359, 375, 100 S.Ct. 1723, 1733, 64 L.Ed.2d 354 (1980).[9]

For example, the Central States Pension Fund presently provides a maximum monthly retirement pension benefit of $2,500 per month to a vested qualified retiree. If a disgruntled retiree sued Central States alleging entitlement to a greater benefit because the Pension Fund's return on its investments increased from the previous year, should a court be permitted to intervene and hold a trial to determine whether actuarial studies were done in light of the previous year's returns and whether the retirement pension benefit levels should therefore be adjusted upwards? Similarly, in the case of a welfare plan which runs a surplus for one or more years, may a court determine that plan provisions limiting the amount payable for certain medical procedures are unreasonable and require the plan to make payments forbidden by the written plan documents? These are determinations which, as Congress has recognized, neither it nor the courts are well-suited to make. Rather, under ERISA this is the type of question which Congress deliberately left to be resolved by the constituencies—the employees, retirees, and employers—which make up multiemployer benefit plans and are represented on the Boards of Trustees of those plans.

Without doubt, any employer, participant or beneficiary may be able to point to a specific plan provision which is adverse to their interest: creating plan provisions involves drawing lines, and it is always possible to argue that the lines could have or should have been drawn elsewhere. But the assets of a trust fund are held for the

---

[9] The exception which proves the rule is the ERISA participation and pension vesting requirements. *See generally* 29 U.S.C. §§ 1052 and 1053. In other matters affecting the substantive terms of benefit plans Congress intended to give market forces free sway. *See Adams v. Avondale Industries,* 905 F.2d at 947 (noting that Congress intended the terms of employee benefit plans to be set by private parties except where ERISA expressly establishes a standard, as in the vesting of pension benefits).

benefit of *all* participants and their beneficiaries. *See* H.R. Conf. Rep. No. 1280, 93d Cong., 2d Sess., *reprinted in* 1974 U.S. Code Cong. & Admin New 5038, 5083. When trustees of a benefit fund adopt amendments to the trust agreement or benefit plan, the courts should not substitute their own reasoning for that of the trustees. But that is what the Sixth Circuit is attempting to do here.

This ruling—as the Sixth Circuit recognized—is at variance with the approach of other courts of appeals. It is also, as Central States has argued, at variance with ERISA and with the decisions of this Court.

The financial stability of Central States (and other benefit plans) should not be jeopardized because the court of appeals second-guessed, years after the fact, the reasoning of the Central States' plan sponsor. This Court should grant this cross-petition for certiorari. That part of the Sixth Circuit's decision reversing and remanding to the district court should be reversed.

CONCLUSION

For the foregoing reasons, this Court should grant the cross-petition for a writ of certiorari.

Respectfully submitted,

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APPENDIX A

Statutory Provisions

Section 302c(5) of the LMRA, 29 U.S.C. § 186(c)(5)

(c) Exceptions

The provisions of this section shall not be applicable . . . (5) with respect to money or other thing of value paid to a trust fund established by such representative, for the sole and exclusive benefit of the employees of such employer, and their families and dependents (or of such employees, families, and dependents jointly with the employees of other employers making similar payments, and their families and dependents): *Provided*, That (A) such payments are held in trust for the purpose of paying, either from principal or income or both, for the benefit of employees, their families and dependents, for medical or hospital care, pensions on retirement or death of employees, compensation for injuries or illness resulting from occupational activity or insurance to provide any of the foregoing, or unemployment benefits or life insurance, disability and sickness insurance, or accident insurance; (B) the detailed basis on which such payments are to be made is specified in a written agreement with the employer, and employees and employers are equally represented in the administration of such fund, together with such neutral persons as the representatives of the employers and the representatives of employees may agree upon and in the event the employer and employee groups deadlock on the administration of such fund and there are no neutral persons empowered to break such deadlock, such agreement provides that the two groups shall agree on an impartial umpire to decide such dispute, or in event of their failure to agree within a reasonable length of time, an impartial umpire to decide such dispute shall, on petition of either group, be appointed by the district court of the United States for the district

where the trust fund has its principal office, and shall also contain provisions for an annual audit of the trust fund, a statement of the results of which shall be available for inspection by interested persons at the principal office of the trust fund and at such other places as may be designated in such written agreement; and (C) such payments as are intended to be used for the purpose of providing pensions or annuities for employees are made to a separate trust which provides that the funds held therein cannot be used for any purpose other than paying such pensions or annuities; . . .

Section 403 of ERISA, 29 U.S.C. § 1103

* * * *

(c) Assets of plan not to inure to benefit of employer; allowable purposes of holding plan assets

(1) Except as provided in paragraph (2), (3), or (4) or subsection (d) of this section, or under sections 1342 and 1344 of this title (relating to termination of insured plans), or under section 420 of Title 26 as in effect on January 1, 1991) the assets of a plan shall never inure to the benefit of any employer and shall be held for the exclusive purposes of providing benefits to participants in the plan and their beneficiaries and defraying reasonable expenses of administering the plan.

(2)(A) In the case of a contribution, or a payment of withdrawal liability under part 1 of subtitle E of subchapter III of this chapter—

> (ii) if such contribution or payment is made by an employer to a multiemployer plan by a mistake of fact or law (other than a mistake relating to whether the plan is described in section 401(a) of Title 26 or the trust which is part of such plan is exempt from taxation under section 501(a) of Title 26), paragraph (1) shall not prohibit the return of such contribution or payment to the employer within 6

months after the plan administrator determines that the contribution was made by such a mistake.

* * * *

Section 404 of ERISA, 29 U.S.C. § 1104

(a) Prudent man standard of care

(1) Subject to sections 1103(c) and (d), 1342, and 1344 of this title, a fiduciary shall discharge his duties with respect to a plan solely in the interest of the participants and beneficiaries and—

(A) for the exclusive purpose of:

(i) providing benefits to participants and their beneficiaries; and

(ii) defraying reasonable expenses of administering the plan;

(B) with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent man acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims;

(C) by diversifying the investments of the plan so as to minimize the risk of large losses, unless under the circumstances it is clearly prudent not to do so; and

(D) in accordance with the documents and instruments governing the plan insofar as such documents and instruments are consistent with the provisions of this subchapter and subchapter III of this chapter.

* * * *

APPENDIX B

Excerpts From Revised and Amended Trust Agreement for Central States, Southeast and Southwest Areas Pension Fund

ARTICLE IV
POWERS AND DUTIES OF TRUSTEES

* * * *

Sec. 9. The Trustees are hereby authorized to formulate and promulgate any and all necessary rules and regulations which they deem necessary or desirable to facilitate the proper administration of the Trust, provided the same are not inconsistent with the terms of the Agreement, and the Articles in the Central States, Southeast and Southwest Areas Agreements creating the Pension Fund. All rules and regulations adopted by action of the Trustees for the administration of the Trust Fund shall be binding upon all parties hereto, all parties dealing with the Trust, and all persons claiming any benefits hereunder.

* * * *

ARTICLE VII
ESTABLISHMENT OF PENSION PLAN

Sec. 1. Formulation of Plan—The Trustees shall formulate a Pension Plan for the payment of such retirement pension benefits, permanent disability pension benefits, death benefits, and related benefits, as are feasible. Such Pension Plan shall at all times comply with all applicable federal statutes and regulations and with the provisions of this Trust Agreement. The Trustees shall not be under any obligation to pay any pension if the payment of such pension will result in loss of the Fund's tax exempt status under the then applicable Internal Revenue Code and any regulations or rulings issued pursuant thereto. The Trustees shall draft procedures, regulations, and conditions for the operation of the Pension Plan, including, by way of illustration and not limitation: conditions of

eligibility for covered Employees, procedure for claiming benefits, schedules of type and amount of benefits to be paid, and procedure for the distribution of benefits. The Trustees may also provide for the payment of partial pensions, any may enter into agreements with other Trustees of pension plans which conform to the applicable sections of the then applicable internal Revenue Code for purposes of tax deductions for the reciprocal recognition of service credits and payments of pension benefits based upon such service credits.

* * * *

Sec. 3. Amendment of Plan—The Pension Plan may be amended by the Trustees from time to time, provided that such amendments comply with the applicable sections of the then applicable Internal Revenue Code, all applicable federal statutes and regulations, the contract articles creating the Pension Fund, and the purposes as set forth in this Agreement. Additionally and not by way of limitation, the Trustees may amend the Pension Plan, in future, or retroactively, where they deem it necessary to maintain the continuation of the Fund's tax exempt status or to preserve compliance with the then applicable internal Revenue Code, applicable federal statutes, and any regulations or rulings issued with respect thereto. A copy of each amendment of the Pension Plan shall be adopted and filed by the Trustees as part of the records and minutes of the Trustees, and one copy thereof shall be distributed to the Union and to each Employer or Employer Group signatory to this Trust Agreement.

* * * *

ARTICLE X
AMENDMENT OF AGREEMENT

It is anticipated that in the administration of this Trust conditions may arise that are not foreseen at the time of the execution of this Agreement, and it is the intention of the parties that the power of amendment, which is hereinafter given, be exercised in order to carry out the

provisions of this Trust, among which is to pay the largest benefits possible, which are consistent with the number of participants becoming and likely to become eligible for such payments, the amounts of funds which are available and which will probably become available, and the following of sound actuarial practice. Therefore, the power is given to the Trustees to amend this Agreement by majority vote, at any time and from time to time, and all parties to the Trust, and all persons claiming an interest thereunder shall be bound thereby, and no participant, Employee member, beneficiary, or any other person shall have any vested interest or right in the Trust Fund or in any payment from the Trust Fund, except as provided by law. The Trustees have full authority to amend, repeal, add to, or take away any right of payment, retroactively or otherwise, that they deem proper for the preservation of this Trust; providing, however, in no event shall the Trust Fund be used for any purpose other than the purpose set forth in this Trust Agreement, and for the purposes of paying the necessary expenses incurred in the administration of this Trust. All amendments to this Agreement shall comply with applicable sections of the Internal Revenue Code, other applicable federal statutes, the Contract Articles creating the Pension Fund and, if applicable, Article IX of the June 30, 1977 master agreement with Equitable and Palmieri.

ARTICLE XIV
MISCELLANEOUS

Sec. 1. In no event shall the Employers, directly or indirectly, receive any refund on contributions made by them to the Trust, except in case of bona fide mistake, and as to which contributions are returned within one year after payment of the contributions, nor directly or indirectly participate in the disposition of the Trust Fund or receive any benefits from the Trust Fund. Upon transfer of each contribution to the Trustees, all responsibilities of the Employers for such contributions shall cease, and

the Employers shall have no responsibilities for the acts of the Trustees. No Employee shall have any individual right, title, interest, or claim against any Employer, Employer's contribution, or the Trust Fund, except as may be expressly provided for in this Agreement or under federal law.

* * * *

Supreme Court, U.S.
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JUL 21 1993
OFFICE OF THE CLERK

NO. 92-2014

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1992

CENTRAL STATES, SOUTHEAST AND SOUTHWEST AREAS PENSION FUND
and
BOARD OF TRUSTEES, CENTRAL STATES, SOUTHEAST AND SOUTHWEST AREAS PENSION FUND
and
EXECUTIVE DIRECTOR, CENTRAL STATES, SOUTHEAST AND SOUTHWEST AREAS PENSION FUND
Cross-Petitioners

vs.

WHITWORTH BROTHERS STORAGE CO.,
Cross-Respondent

ON CROSS PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

BRIEF IN OPPOSITION TO CROSS-PETITION FOR WRIT OF CERTIORARI

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BEST AVAILABLE COPY

QUESTION PRESENTED FOR REVIEW

Whether written documents and amendments thereto governing an employee benefit plan subject to the Employee Retirement Income Security Act of 1974 ("ERISA"), as amended, 29 U.S.C. § 1001 et seq., must withstand judicial review under a "reasonableness" standard? Specifically, whether a trust agreement provision limiting the period for which an employer may recover contributions paid to the plan by mistake of law may be determined to be "arbitrary and capricious" and set aside in light of the surrounding circumstances, law, and equities as determined by the court?

TABLE OF CONTENTS

PAGE

QUESTIONS PRESENTED FOR REVIEW . . . i

TABLE OF CONTENTS. ii

TABLE OF AUTHORITIES. iii

I. STATEMENT OF THE CASE. 1

THE 1980 AMENDMENT TO TRUST AGREEMENT ARTICLE XIV, SECTION 1. 8

II. ARGUMENT. 18

REASONS FOR DENYING THE CROSS-PETITION FOR WRIT OF CERTIORARI 18

THERE HAS BEEN NO PROOF OF HARM TO THE FINANCIAL STABILITY OF THE PLAN. 29

III. CONCLUSION. 32

TABLE OF AUTHORITIES

PAGE

CASES

Admiral Packing Co. v. Robert F. Kennedy Farm Workers Medical Plan, 874 F.2d 683 (9th Cir. 1989) 18, 19

Aronson v. Lewis, 473 A.2d 805 (Del. 1984) 25

Central States etc. v. Central Transport Inc., 472 U.S. 559 (1985). 11, 20, 24, 26

Crews v. Central States S.E. & S.W. Areas Pension Fund, 788 F.2d 332 (6th Cir. 1986). . . . 27

Dumac Forestry Services, Inc. v. Int'l Broth. of Elec. Workers, 814 F.2d 79 (2d Cir. 1987) 19

Electricians Health, Welfare, & Pension Plans v. Gulino, 594 F.Supp. 1265 (M.D.La. 1984) 19-20

Firestone Tire & Rubber Co. v. Bruch, 489 U.S. 101 (1989). 20-22, 28

Fuller Cinder Co. v. Central States Pension Fund, 2 Employee Benefits Cases 2458 (E.D.Mich. 1982). 27

Gries Sports Enterprises v. Cleveland Browns Football Co., 26 Ohio St.3d 15, 496 N.E.2d 959 (1986). 25

Jamail, Inc. v. Carpenters District Council of Houston Pension and Welfare Fund, 954 F.2d 299 (5th Cir. 1992) 19, 29

Kwatcher v. Mass. Service Employees Pension Fund, 879 F.2d 957 (1st Cir. 1989). 19, 26, 29

Peckham v. Board of Trustees of Int'l Bhd. and Allied Trades Union, 719 F.2d 1063 (10th Cir. 1983). 19

Pilot Life Ins. Co. v. Dedeaux, 481 U.S. 41 (1987). 20, 28

Plucinski v. I.A.M. National Pension Fund, 875 F.2d 1052 (3d Cir. 1989). 19, 29

Secretary of Labor v. Fitzsimmons, 805 F.2d 682 (7th Cir. 1986). . 30

United Mine Workers of America Health & Retirement Funds v. Robinson, 455 U.S. 562 (1982). 20

Wells v. U.S. Steel & Carnegie Pension Funds, Inc., 950 F.2d 1244 (6th Cir. 1991). 19

Whitworth Bros. Storage Co. v. Central States, Southeast & Southwest Areas Pension Fund, 982 F.2d 1006 (6th Cir. 1993) 2, 3, 5, 12, 13, 15, 16, 19

STATUTES

29 U.S.C. § 186(c)(5) 20
29 U.S.C. § 1001 et seq i
29 U.S.C. § 1002(2)(A) 1
29 U.S.C. § 1103(c)(2)(A) 9, 11, 12, 27
29 U.S.C. § 1104(a)(1)(B) 24
29 U.S.C. § 1132 22

RULES

Fed.R.Civ.P. 56. . . . . 13, 17

OTHER AUTHORITY

3 W. Fratcher, Scott on Trusts § 201. 22

Restatement (Second) of Trusts § 187 Comment d (1959). 22, 23

H.R.Rep. No. 869(I), 96th Cong. 2nd Sess. 4, reprinted in 1980 U.S.C.C.A.N. 2918. 12

Joint Explanation of S. 1076: Multiemployer Pension Plan Amendments Act of 1980, 126 Cong.Rec.S. 10130 (July 29, 1980) 12

Note, Implying a Statutory Right for Employers for Return of Mistaken Overcontributions to a Multiemployer-Employee Benefit Plan, 62 Notre Dame L.Rev 396 (1987). 26

NO. 92-2014

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1992

CENTRAL STATES, SOUTHEAST AND
SOUTHWEST AREAS PENSION FUND
and
BOARD OF TRUSTEES, CENTRAL STATES,
SOUTHEAST AND SOUTHWEST AREAS
PENSION FUND
and
EXECUTIVE DIRECTOR, CENTRAL STATES,
SOUTHEAST AND SOUTHWEST AREAS
PENSION FUND
Cross-Petitioners

vs.

WHITWORTH BROTHERS STORAGE CO.,
Cross-Respondent

ON CROSS PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

BRIEF IN OPPOSITION TO CROSS-PETITION FOR WRIT OF CERTIORARI

Whitworth Brothers Storage Co. (herein "Whitworth Bros.") respectfully submits its Brief in Opposition to the

Cross-Petition for Writ of Certiorari.[1]

I. STATEMENT OF THE CASE[2]

William and Ernest Whitworth were co-owners, shareholders, officers, and employees of cross-petitioner, Whitworth Brothers Storage Co. ("Whitworth Bros."), a family-operated business begun by their

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[1]Cross-respondent has petitioned for a writ of certiorari in Whitworth Bros. Storage Co. v. Central States, Southeast & Southwest Areas Pension Fund, Supreme Court Case No. 92-1848. Whitworth Bros. received the cross-petition in Case No. 92-2014 on June 21, 1993.

[2]Most of the facts pertinent to this cross-petition are accurately stated in Whitworth Bros. Storage Co. v. Central States Southeast & Southwest Areas Pension Fund, 982 F.2d 1006 (6th Cir. 1993)("Whitworth II"), which has been reprinted in the Appendix to the Petition for Writ of Certiorari in Supreme Court Case No. 92-1848, at pages 2a-65a (herein "Pet.App., No. 92-1848 at page _____"). Because the Court of Appeals accurately recounts the procedural history of this case, it is not addressed at length herein.

father. From 1955-1980 for William, and from 1955 to 1981 for Ernest, Whitworth Bros. made employer contributions to Central States, Southeast and Southwest Areas Pension Fund (herein "Central States"). See Whitworth II, 982 F.2d 1006, 1007; Pet.App., No. 92-1848 at pages 4a-5a. Central States was originally one of the Taft-Hartley Funds and is a multiemployer pension benefit plan under Section 1002(2)(A) of the Employee Retirement Income Security Act of 1974 ("ERISA"). Since Whitworth Bros. began making contributions to Central States, Whitworth Bros. mistakenly believed that it was required to make pension contributions pursuant to the terms of a collective bargaining agreement. Had William and Ernest been employees and not employee-owners they would have been

entitled to a pension from their contributions.

William Whitworth sought to retire in 1979-1980 and requested pension benefits from Central States. Central States ultimately denied his request for a pension on the basis that William Whitworth was an owner and not an employee under ERISA.

William Whitworth retired in March, 1980 and notified Central States of that fact. After that time, Whitworth Bros. made contributions only on behalf of Ernest Whitworth and no other employee. In mid 1980, William Whitworth had not received a pension and was asked whether he had the right to hire and fire while an employee with Whitworth Bros. On November 4, 1980, Whitworth Bros. demanded that Central States either pay William

Whitworth a pension or refund his pension contributions.

After more correspondence, the denial of William Whitworth's pension request, and a second formal demand by Whitworth Bros. for a refund, eight months later, on July 23, 1981, Central States finally acted. Central States denied a refund of contributions on behalf of William Whitworth from 1964 to November, 1979, totalling $7,506; Whitworth Bros.'s account was given a $384.00 credit (from November, 1979 through March, 1980) against future bills that weren't even owed. Whitworth II, 982 F.2d 1006, 1009, 1010 n.6; Pet.App. No. 92-1848 at pages 14a, 17a.

In their July 23, 1981 letter denying refund of the William Whitworth contributions of $7,506.00, Central States

wrote Whitworth Bros.:

> "This denial is based upon the applicable provisions of the Internal Revenue Code and the Employee Retirement Income Security Act of 1974 as amended by the Multiemployer Pension Plan Amendments Act of 1980, Section 310 [sic]. These provisions are very restrictive in terms of those conditions under which refunds are permissible.
>
> We hope you understand that your request was denied because the Central States, Southeast and Southwest Areas Pension Fund must comply with the federal law which governs the operations of Pension Funds."

(Emphasis supplied.)[3]

The evidence derived from this litigation paints a different story. The minutes to the July 14-15, 1980 Trustees' Meeting show that Central States based its refund determination on the following criteria: correspondence (including letters from Whitworth's counsel), most of

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[3]This letter is found in the record at R.56 [Plaintiff's Brief in Opposition to Summary Judgment, appended Exhibit 8].

which was copied to Local Union 392; the Fund's Whitworth Bros. account breakdown (never provided to Whitworth Bros. prior to this lawsuit); a telephone call by Central States Refund Committee to Local Union 392 on June 12, 1980 (again, without Whitworth Bros.' knowledge); the refund committee's June 25, 1980 recommendation, forwarded to Local Union 392 before the Trustees acted (and never to Whitworth Bros. until well into this lawsuit); and on the Central States' amended refund policy (Trust Agreement Article XIV, Section 1, which had been amended, without Whitworth Bros. knowledge, during the pendency of Whitworth Bros. request for a refund. See R.36 [Defendant's Motion for Summary Judgment, Priede Affidavit, Exhibit I].

THE 1980 AMENDMENT TO TRUST AGREEMENT ARTICLE XIV, SECTION 1

On December 16-17, 1980, Central States amended its employer contribution refund policy (Article XIV, Section 1 of the Trust Agreement) to permit employer refunds for "mistakes of law." The Trustees considered only two options (Resolutions A & B), but "both would preserve intact the one-year limit of the Pension Fund and the 30-day limit of the Health and Welfare Fund, respectively." (Emphasis supplied). R.36 [Defendants' Motion for Summary Judgment, Priede Aff., Exh. B].[4]

The existing one-year limitation on employer refunds was maintained, in part on the advice of Central States' counsel,

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[4]Resolution A would have continued the current refund policy ("mistakes of fact only") without any substantive changes.

who opined that neither "retroactive nor prospective modification of prior and current employer contribution refund policies and procedures of the Fund is required by law or by equity." Central States amended its refund policy in light of changes of law brought by the Multi-Employer Pension Plan Amendments Act of 1980 ("MPPAA"), especially to 29 U.S.C. § 1103(c)(2)(A).

In amending and maintaining its refund policy, Central States noted that the current policy resulted in denials of employer refunds for "mistakes of law," and that the Courts had enforced the distinction between mistakes of fact and law. Resolution B accompanying the minutes stated that the Fund needed to protect itself from "significant adverse" and "inequitable effect" of employer

refund requests and "unjustified and detrimental delay by employers in seeking employer contribution refunds." Central States decreed there be "reasonable time limits" upon requests for employer refunds. Central States then declared, without elaboration, that its existing refund policies and procedures, including the one-year refund limitation, were "reasonable in their application" and needed no further changes. R.36 [Defendants' Motion for Summary Judgment, Priede Aff., Exh. B].

In its cross-petition and appendices, Central States fails to identify one key provision of the Trust Agreement:

> "The Trustees, by majority action, shall have the power to construe the provisions of this Agreement and the terms and regulations of the Pension Plan; and any construction adopted by the Trustees <u>in good faith</u> shall be binding upon the Union, Employees

and Employers."
Article IV, § 17[5] (Emphasis supplied)

Section 410 of the MPPAA amended 29 U.S.C. § 1103(c)(2)(A)[6] retroactive to January 1, 1975. The Sixth Circuit noted that the amendments "greatly expanded the scope of section 1103(c)(2)(A) for multiemployer pension plans;" permitted refunds for mistakes of law as well as of fact; and eliminated the one-year limitation on the return of contributions.

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[5]In Central States etc. v. Central Transport Inc., 472 U.S. 559 (1985), this same provision justified Central States' decision to audit employers.

[6]That section currently reads:

> "In the case of a contribution. . . made by an employer to a multiemployer plan by a mistake of fact or law. . .paragraph (1) shall not prohibit the return of such contribution or payment to the employer within 6 months after the plan administrator determines that the contribution was made by such a mistake."

There was also "no express limitation as to the number of mistaken contributions that can be refunded under 29 U.S.C. § 1103(c)(2)(A)(ii)." The statute provided "that the contributions must be returned within six months after the plan administrator determines that the contributions were made by mistake." Whitworth II, at 1011; Pet.App. No. 92-1848 at 22a-23a.

As to the legislative purpose:

> There is no explanation in the legislative history for the elimination of the one-year limitations and the substitution of the six-months provision. This liberalization of the statutory provision for the refund of contributions however, might encourage more employer and employee pension plan participation and thus is certainly not inconsistent with the MPPAA's intent to foster plan contribution and growth. H.R.Rep. No. 869(I), 96th Cong. 2nd Sess. 4, reprinted in 1980 U.S.C.C.A.N. 2918, 2919."

Whitworth II, at 1011 (Emphasis

supplied)(footnote omitted).[7]

After Central States moved for summary judgment, Whitworth Bros. sought discovery on the refund policy rule. After Central States refused to permit any discovery, the district court allowed some limited discovery. R.47, 44. Discovery revealed that as to the Central States' conclusion that "significant adverse" impact if contributions were funded, that the one year refund limit policy was adopted without any actuarial data, studies, or evidence to support these conclusion. R.56 [Plaintiff's Brief in Opp. to Summary Judgment, Answers to

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[7]Congress added "mistake of law" to 29 U.S.C. § 1103(c)(2)(A) because prior law was "too narrow." Whitworth II, 982 F.2d at 1011 n.9 [quoting Joint Explanation of S. 1076: Multiemployer Pension Plan Amendments Act of 1980, 126 Cong.Rec.S. 10130 (July 29, 1980)]."

Amended Interrogatory No. 4].[8]

The District Court permitted discovery on the effect of the refund policy from September 26, 1980 through

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[8]Whitworth Bros. inquired as to Defendant's Summary Judgment Exh. B:

"4). In Defendant's Exhibit "B" the resolution described the "significant" and "adverse" effect on the Plan's funding if mistakenly paid contributions were refunded:

(a) what studies were done to support such conclusion of "significant" or "adverse" impact if contributions were refunded.

Answer: Central States is not aware of any studies that were done.

(b) if studies were done, please supply copies of such studies or the actuarial or statistical date to support the conclusion

Answer: N/A

(c) if no studies were made and no evidence exists to back up such conclusion, what estimate was given to the trustees for their consideration and by whom;

Answer: Unknown

(d) what dollar amount were used to support the conclusion and what actuarial evidence was supplied.

Answer: Unknown."

December 31, 1983.[9] Central States received 383 applications for employer refunds with a total value of $1,613.446.97; 226 applications were granted in whole or in part; 157 were denied totally; and $916,900.60 was credited or refunded to employers for present and future obligations. Thus, Central States was unjustly enriched by almost $700,000 over a three year period under its one year refund policy. R.56 [Plaintiff's Brief in Opp. to Summary Judgment, attached Answers to Amended Interrogatory No.9]. Central States received further windfalls (and its liabilities' were decreased) because it did not have to pay pensions to owner-employees such as William Whitworth.

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[9]The District Court prohibited any inquiry re: the effect of the one year policy prior to September 26, 1980.

Pet.App. No. 92-1848 at page 52a; 982 F.2d at 1017.

In 1980, Central States received employer contributions in the amount of approximately 650 million dollars, and had total income of 860 million. R.56 [Plaintiff's Brief in Opp. to Summary Judgment, Exh. 12].

After the July 23, 1981 denial of a refund, Whitworth Bros. immediately ceased making pension contributions for Ernest Whitworth. Central States kept billing Whitworth Bros., threatened collection through letters and phone calls, and assessed interest and penalties. Meanwhile, the one year refund policy was in effect. Although Whitworth Bros. filed suit in September, 1983 to obtain a refund and to declare the rights of the parties as to the unowed contributions, Central

States kept billing Whitworth Bros. through August, 1984. Whitworth II, 982 F.2d at 1009; Pet.App. No. 92-1848 at page 12a.

Granting summary judgment, the District Court merely proclaimed the one-year policy was reasonable. Pet.App. No. 92-1848 at page 47a, Whitworth II, 982 F.2d at 1016. On appeal, the Sixth Circuit reversed in relevant part. Agreeing with the reasoning of five Circuits, the Sixth Circuit held that a refund policy was arbitrary and capricious and inconsistent with principles of equity unless it was supported by actuarial or financial data and necessary to the financial stability of the fund, or justified by other compelling reasons. As to the unsupported assertions of peril to the Fund's financial stability, the Court

remanded for an evidentiary hearing on the reasonableness of the policy. Pet.App. 92-1848 at 47a-56a; Whitworth II, supra, at 1016-18.

II. ARGUMENT

REASONS FOR DENYING THE CROSS PETITION FOR WRIT OF CERTIORARI

The Sixth Circuit described cross-petitioner's purported conflict among the Circuits as follows:

> "The circuit courts are split in regard to the issue of whether a federal court may determine in an action for restitution under federal common law that a contractual limitation on refunds for contributions mistakenly made is unreasonable. The only circuit that upholds any contractual limitation in regard to refunds as binding under federal common law is the Ninth Circuit"[10]

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[10]Admiral Packing Co. v. Robert F. Kennedy Farm Workers Medical Plan, 874 F.2d 683 (9th Cir. 1989)

* * * *

> The majority of the courts of appeals disagree with the Ninth Circuit and examine the refund provision of a benefit fund's trust agreement to see if it is arbitrary and capricious as weighed by principles of equity."[11]

Whitworth II, 982 F.2d at 1013-14.

There does appear to be a Circuit conflict. However, Admiral Packing did

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[11]Kwatcher v. Mass. Service Emp. Pension Fund, 879 F.2d 957 (1st Cir. 1989); Dumac Forestry Services, Inc. v. Int'l Broth. of Elec. Workers, 814 F.2d 79 (2d Cir. 1987); Plucinski v. I.A.M. National Pension Fund, 875 F.2d 1052 (3d Cir. 1989); Jamail, Inc. v. Carpenters District Council of Houston Pension and Welfare Fund, 954 F.2d 299 (5th Cir. 1992); Whitworth II, supra; Peckham v. Bd. of Trustees of Int'l Bhd. of Painters and Allied Trades Union and Industry Nat'l Pension Fund, 719 F.2d 1063 (10th Cir. 1983). In a pension fund's federal common law action for restitution from a beneficiary, the Sixth Circuit refused to follow the Admiral Packing reasoning and was guided not by the document alone, but by equitable principles. Whitworth II, 982 F.2d at 1017 [discussing Wells v. U.S. Steel & Carnegie Pension Funds, Inc., 950 F.2d 1244, 1250 (6th Cir. 1991)].

not examine any of the other Circuit decisions[12], stands alone without influence on the other Circuits, and relies primarily upon United Mine Workers of America Health & Retirement Funds v. Robinson, 455 U.S. 562 (1982). Robinson is distinguishable because it involved 29 U.S.C. § 186(c)(5) and had nothing to do with ERISA at all.

Nor does this identified conflict in reasoning extend as far as suggested by the cross-petition. In light of this Court's ERISA precedents, the conflict may be illusory.[13] In a nutshell, the cross-

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[12]The Admiral Packing court relief upon Electricians Health, Welfare, & Pension Plans v. Gulino, 594 F.Supp. 1265 (M.D.La. 1984), whose reasoning has been repudiated by Jamail, supra.

[13]Central Transport, supra, 105 S.Ct. at 2839 (trust documents can not excuse trustees from their duties under ERISA and must be construed in light of ERISA policy); Pilot Life. Ins. Co. v. Dedeaux,

petition represents a diatribe against even minimal judicial review of pension fund operations by the federal judiciary. See cross petition at pages 11, 21. According to Central States, federal judges are, without any legal grounds, engaging in judicial activism of the worst magnitude.

This Court should not be fooled by cross-petitioners. Central States' FAILS TO CITE AND ADDRESS THE ONE CASE THAT HAS GREAT BEARING ON THE STANDARD OF JUDICIAL REVIEW IN THE CONTEXT OF FEDERAL COMMON LAW UNDER ERISA:

> Firestone Tire & Rubber Co. v. Bruch, 489 U.S. 101 (1989)

Firestone refused to incorporate

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481 U.S. 41 (1987)(courts to fashion federal common law rights and obligations); Firestone Tire & Rubber Co. v. Bruch, 489 U.S. 101 (1989)(common law of trusts governs).

principles of the Labor Management Relations Act ("LMRA") wholesale. The common law of trusts, not of contracts (or collective bargaining agreements) applied in ERISA. Although the Firestone holding was limited to judicial review in denial of benefits cases under 29 U.S.C. § 1132, Firestone provides guidance:

> "As they do with contractual provisions, courts construe terms in trust agreements without deferring to either party's interpretation. 'The extent of the duties and powers of a trustee is determined by the rules of law that are applicable to the situation, and not the rules that the trustee or his attorney believes to be applicable, and by the terms of the trust as the court may interpret them, and not as they may be interpreted by the trustee himself or by his attorney.' 3 W. Fratcher, Scott on Trusts § 201, at 221. A trustee who is in doubt as to the interpretation of the instrument can protect himself by obtaining instructions from the court."

109 S.Ct. at 955 (emphasis added).

This Court concluded the discussion of the scope of judicial review pointedly:

> "Of course, if a benefit plan gives discretion to an administrator or fiduciary who is operating under a conflict of interest, that conflict must be weighed as a 'factor[] in determining whether there is an abuse of discretion.' Restatement (Second) of Trusts § 187, Comment d (1959)." Firestone, supra, at 956-957.[14]

Central States argues that its 1980 amendment to the refund policy was reasonable because the Trustees adopted it. Once part of the trust document,

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[14] "In determining the question whether the trustee is guilty of an abuse of discretion in exercising or failing to exercise a power, the following circumstances may be relevant: (1) the extent of the discretion conferred upon the trustee by the terms of the trust; (2) the purposes of the trust; (3) the nature of the power; (4) the existence or nonexistence, the definiteness or indefiniteness, of an external standard by which the reasonableness of the trustee's conduct can be judged; (5) the motives of the trustee in exercising or refraining from exercising the power; (6) the existence or nonexistence of an interest of the trustee conflicting with that of the beneficiaries."
Restatement (Second) of Trusts § 187 Comment d (Emphasis supplied).

federal judges must blindly and uncritically implement it. This position is unwarranted under ERISA and trust law.

Under Article X, Central States had the power to amend the trust agreement. It also had the power to construe terms in the agreement (such as when there is a need to amend the agreement) so long as the construction is done in good faith. Article IV, § 17. But trustees are "fiduciaries" who do not have unbridled power immune from judicial review. Fiduciaries must discharge their duties

> "with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent man acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims."

Central Transport, Inc., supra, 105 S.Ct. at 2840 [quoting 29 U.S.C. 1104(a)(1)(B)].

The standard of acting with "care, skill, prudence" must mean more than

parroting unsupported conclusions that are convenient and expedient, not based on any data or studies, and represent a conflict of interest. An analogy may be drawn to other areas of law involving fiduciaries.

A corporate Board of Directors has fiduciary duties. Under the business judgment rule, courts generally will not disturb the Director's judgment on corporate decisions. But in order to invoke the protection of the rule, though, the Directors

> "must inform themselves, prior to making a business decision, of all material information reasonably available to them. Having become so informed, they must then act with requisite care in the discharge of their duties."

Gries Sports Enterprises v. Cleveland Browns Football Co., 26 Ohio St.3d 15, 496 N.E.2d 959 (1986)(Emphasis supplied) [applying Delaware corporation law: Aronson v. Lewis, 473 A.2d 805, 812 (Del. 1984)].

Under such standard, corporate boards

can not shirk their responsibilities and must apprise themselves of reasonable available material when considering matters such as mergers or tender offers.

As the First Circuit observed, pension "participants and beneficiaries are not entitled to funds to which they had no right in the first place." Kwatcher, supra, 879 F.2d at 967 [quoting Note, Implying a Statutory Right for Employers for Return of Mistaken Overcontributions to a Multiemployer-Employee Benefit Plan, 62 Notre Dame L.Rev. 396, 409 (1987)]. Trustees have no license to obtain contributions they are not entitled to in the first place. Fiduciaries must act with "the requisite skill and care" to determine what are trust assets (and by implication, what are not.) Central Transport, supra.

Central States did not adopt a refund rule consistent with the September 26, 1980 amendments in 29 U.S.C. § 1103(c)(2), which "greatly liberalized" previous law. Rather, they maintained, to the greatest extent possible, the draconian version Congress repealed.[15] When the Trustees considered the rules changes during the pendency of Whitworth Bros. request, they did not inform Whitworth Bros.. Nor did they seek any studies, actuarial evidence, or a report of the operation of the old policy. Instead, their minutes are filled

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[15]It must be noted that the Trustees knew of the plight of small owner-employees when it maintained its policy in 1980. Just ask Mr. Crews, see Crews v. Central States S.E. & S.W. Areas Pension Fund, 788 F.2d 332 (1986)(for factual background), who contributed from 1950-1978. Mr. Fuller, Fuller Cinder Co. v. Central States Pension Fund, unreported, 2 Employee Benefits Cases 2458 (E.D.Mich. 1982), also suffered the same as Whitworth Bros. If permitted, discovery would reveal countless others.

with unsupported conclusions. And in informing Whitworth Bros. about the denial of the refund, they stated that the law was "very restrictive." In short, they lied. Meanwhile, they were unjustly enriched by nearly $200,000 a year from 1980-1983.

Arbitrary and capricious denotes some minimal degree of rationality and integrity in the decision making process. The judiciary has acted properly in reviewing the decision making process of Trustees and in furthering the equitable goals of ERISA, such as fostering the growth of voluntary ERISA plans. Pilot Life Ins. Co. v. Dedeaux, 481 U.S. 41 (1987) encouraged the federal courts to create federal common law rights and obligations; Firestone told the Courts to borrow from the law of trusts. If

unchecked, bad pension funds will promulgate policies that derogate federal common law.

As Jamail observed:

> "Moreover, not every pension fund will be administered in a reasonable manner. An unscrupulous trustee could extort money out of an employer by fraud and then refuse to refund the money."

Jamail, supra, 954 F.2d at 304 (citing Plucinski, supra, 875 F.2d at 1058.

THERE HAS BEEN NO PROOF OF HARM TO THE FINANCIAL STABILITY OF THE PLAN

Although Central States raises the specter of harm to its financial stability, it failed to provide any evidence of that before the District Court. The Court of Appeals noted this failure.[16] Pet.App. No. 92-1848 at 48a.

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[16]In fact, Central States improperly attempted to provide this evidence for the first time on appeal, and caused the Sixth Circuit to utilize such improper evidence. That improper use is Question 4 to the

The only evidence of Central States' financial condition in the record before the district court was that in 1980, Central States had 3 billion dollars in net assets. In the year 1980, Central States received over 650 million dollars in employer contributions and had 850 million dollars of income. R.56 [Brief in Opp. to Summary Judgment, Exh. 12]. Between September, 1980 to December 31, 1983, employer's requested 1.6 million dollars in refunds (amounting roughly to an average of $500,000 per year.) Whitworth Bros. requested a refund of $20,000. Moreover, the pension fund received a windfall by not paying a pension.

The real threat to the financial stability of Central States has been the

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Petition in Case No. 92-1848.

behavior of its past trustees,[17] its present ones, and its generous administrative expenses (lawyers, lawyers, and more outside lawyers, fighting the legitimate refund claims of small employers such as Whitworth Bros). All of which have depleted the resources and goodwill (as if there were any) of the Central States Pension Fund. Small employers have been discouraged from participating in pension plans such as Central States.

The conflict between the Ninth Circuit and the rest of the judiciary appears to be localized. The majority of Circuits are correct in allowing principles of equity, fairness, and rationality to enter the picture.

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[17] Secretary of Labor v. Fitzsimmons, 805 F.2d 682, 684-87 & n.7 (7th Cir. 1986) (en banc) (describing corruption).

III. CONCLUSION

Accordingly, for the foregoing reasons, this Court should deny the Cross-Petition for Writ of Certiorari.

Respectfully Submitted,

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